87 - 43

NO. A-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PATRICIA CONNERS,

Petitioner,

vs.

CULINARY WORKERS UNION, LOCAL 226,

Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETER L. FLANGAS
600 South Third Street
Las Vegas, Nevada 89101
(702) 384-1990
Attorney for Petitioner

90

NO. A-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PATRICIA CONNERS,

Petitioner,

vs.

CULINARY WORKERS UNION,LOCAL 226,

Respondent

QUESTIONS FOR REVIEW

(1) Whether the investigation made by the Union was in conformity with its duty of representation, or due to its lack of interest or zeal in its undertaking of its duty merely to get through or rid of the matter subverted the arbitration process by

conducting, at best, a perfunctory investigation thereby reducing the grievance procedure to an egregious, arbitrary, discriminatory, bad faith exercise in futility.

(2) Whether the Union must exercise special care in handling a grievance which concerns a discharge, since discharge = the industrial equivalent of capital punishment.

(3) Whether Petitioner's discharge was the result of a conspiracy between the Union and Hotel and whether the manner in which she was discharged deprived her of substantive and procedural due process rights.

PARTIES TO PROCEEDINGS

The names of all parties to these proceedings are contained in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

CONSTITUTITIONAL AND STATUTORY PROVISIONS

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice
and Associate Justices of The
Supreme Court of The United States:

Patricia Conners, by and through her attorney, PETER L. FLANGAS, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., infra 1a-3a) is not reported. The Findings of Fact and Conclusions of Law of the District Court for the District for Nevada (App.A., infra 4A-13A) and

the Judgment (App.A., infra 14A) are not reported. A prior unreported opinion of the Court of Appeals (App. A, infra 15A-24A) reversing an order granting summary judgment is attached hereto.

JURISICTION

The judgment of the court of appeals (App.A., infra 1a3a) was entered on March 16, 1987. On June 4, 1987, Associate Justice SANDRA DAY O'CONNOR extended the time within which to file a Petition for a Writ of Cettiorari to June 30, 1987. The jurisdiciton of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

This action concerns a federal question arising pursuant to Section 301 of Labor Management Relations Act, Title 29 U.S.C. Section 185 (b) and a labor union's duty of fair representation arising therefrom, which provides as follows:

> Responsibility for acts of agents; entity for purpose of suit; enforcement of money judgments.
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined

in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Also involved is the Fifth Amendment to the United States Contitution:

> "Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or public use, without just compensation".

STATEMENT OF CASE

From June 9, 1979, to March 9, 1980, PATRICIA CONNERS, Petitioner herein, worked as a cocktail waitress at the Stardust Hotel in Las Vegas. Her first station was the casino room. After four months, the casino manager transferred her to the graveyard shift in a restaurant area with little cocktail business, where

CONNERS lost all tip income. Five months after the transfer the hotel posted a notice of a job opening in the casino room. CONNERS bid for the position, but although she was the only employee to do so, the hotel hired an outside person. CONNERS complained to the Union, which filed a grievance with the hotel. Six days after the Union filed the grievance, two customers were conducted to the restaurant from the casino area and ordered drinks. When CONNERS served them, they complained that she brought the wrong drinks. They allege that she replied rudely. CONNERS claims she was polite. The customers called for the hostess and demanded complaint forms, which they

completed. The restautant manager fired CONNERS on the spot. CONNERS filed another grievance with the Union the next day. The union grieved the Hotel and wrote to the two men asking for their versions of the incident. Two weeks later, CONNERS meet with the Union and Hotel representatives. They agreed to hold her first grievance in abeyance pending resolution of the termination grievance. The vote on CONNERS' termination was split with the Union voting against it on the grounds that it had not yet heard from the two customers.

The next month the Hotel provided Union with Affidavits from two customers, repeating the allegations

in their complaint forms. The Union then decided not to arbitrate CONNERS' grievance. CONNERS filed suit charging that the Union breached its duty of fair representation by refusing to arbitrate. Union filed a Third Party Complaint naming Hotel as being responsible for any damages that Conners may secure from Union by virtue of her suit. Thereafter, Union moved for summary judgment. The district court granted the motion. CONNERS appealed. By memorandum dated March 4, 1985, the Court of Appeals reversed and remanded for trial. (App A, infra 614A-22A) In the Memorandum of Patricia Conners v. Culinary Workers Union Local 226, Case No. 84-2096,

dated March 4, 1985, the Court said:

> "Given Conners recent transfer and the even more recent filing of her grievance against the hotel, this chain of events at least suggests the possibility that the incident in the restaurant was staged.
>
> "Yet the Union did little to investigate Conners' grievance, and did nothing at all to investigate Conners' version of events. The Union contacted only the two customers. Predictably, they repeated their allegations of rudeness. The

Union did not interview the hostess on duty, nor did it even attempt to locate possible witnesses to the event who could substantiate Conners' story. Conners' earlier transfer and the hotel's refusal of her shift bid ought to have put the Union on notice that an especially thorough investigation of her termination was necessary." (App.21 A, infra 23A)

The above observation was made by the Court of Appeals prior to trial, pursuant to the appeal from the grant of summary judgment. At the trial of this matter the following facts

were, developed.

Lou Salerno was the casino manager at the Stardust Hotel and was in charge of casino operations for Trans -Sterling which operated three hotel casino operations in Las Vegas, Nevada. He answered only to the owner. He took a strong dislike to Patricia Conners, a cocktail waitress employed at one of the three hotel casino operations he oversaw. His intense animosity was personal not work related, "No. She worked alright. . . I just didn't like her and I didn't want her there. That was my

privilege. I didn't want her there period.

He instructed the Food and Beverage Director Carlos Roig to fire her. Roig responded by telling him that she was employed under the Union contract. Nevertheless, Lou Salerno ordered that she not be allowed in "his" casino area.

In an effort to please Salerno and compelled to follow his orders, Carlos Roig assigned Patricia Conners to the Palm Room Coffee Shop. Patricia Conners contacted the Union and was told there was nothing that could be done

since she was not on a bid shift. Some five (5) months later a bid shift was posted by Hotel for the slot area of the casino.

Even though the bid sheet stayed up two extra days Patricia Conners was the only person to place her name on the bid sheet for the bid shift position. Employee complained to the Union which filed a grievance with the Hotel. Six days after the Union filed the grievance on the 9th day of March, 1980, two persons, later identified as Davis and Gasperian, came into the coffee shop from the

casino, where drinks are free and ordered drinks.
Immediately prior to this when approached by the food server, Bob Jones, they told him, "Get the hell out of her. Get us a cocktail waitress".

The waiter notified the hostess of their desire and requsted that since he was a new, probationary employee, someone else attend to them. The hostess then summoned the cocktail waitress.

As Patricia Conners approached the area Bob Jones cautioned her that the customers "were very rude. They just told me to get the

hell away from the table".

In response to the question asked of Patricia Conners regarding "what did you do" when told by the hostess she had an order for cocktails, she testified as follows:

"She pointed out the two gentlemen sitting in the back of the Palm Room, and as I was approaching the two gentlemen Bob Jones, the waiter at that time, came up to me and warned me that the customers were nasty to him and to be careful, and I thanked him and then went to the table.

When I approached the table I asked the two gentlemen

that had asked for cocktails if I could help them. The one gentlemen ordered Chivas and water, and being that the waiter had cautioned me on the customers, I wanted to make sure I got the order right, so I repeated it, you know, that he wanted Chivas and water. He said yes. I went back.

"Oh, I asked the other gentlemen then if he would care to order, and the other gentleman said no, he was holding off; to go get the first gentleman his order and that he would order later.

"I went and I got the gentlemen his first drink of

Chivas and water and brought it back to the table. When I put it in front of the gentleman, I asked the other gentleman if he'd like to order now. He informed me he'd like grapefruit juice, and I asked him if he'd like plain grapefruit juice, and he said yes, and I told him that the food server could get him his plain grapefruit juice, which then he said, well, to get him a vodka and grapefruit".

" I turned around then and I went back to the service area and got the gentleman his vodka and grapefruit. I brought it back to the table, and the first

gentleman told me that I didn't bring him bourbon and water, at which time I said no, I was sorry,I thought he had ordered Chivas and water. And he said no, it was wrong. And I said I was sorry and I picked up the drink and I went to exchange it.

"On bringing the drink back, the bourbon and water, the gentleman that I gave the grapefruit juice to said I had swore at them, and I told him that I did not swear at him, and then he asked me if I was calling him and his friend liars; that they heard me. And I said to him that I wasn't calling either him or his

friend a liar, but I just did not swear at them.

" Then he wanted to know my name. I told him my name was Patty. He asked me if my boss was there, and I looked around the Palm Room, because Max was in the back of the Palm Room when I went in orginally to see if anybody wanted drinks when I arrived at two o'clock, and I looked around the Palm Room and he wasn't there.

"I went back and picked up the phone in the service area there and had Max paged. When he came to the service area, I pointed out the two gentlemen that had a

complaint against me."

Patricia Conners was immediately discharged even though the waiter told Max Hamilton that employee had not been rude, nothing happened, and that she did not swear at the customers.

Union gave notice of the grievance over the discharge to Hotel on March 12, 1980.

Carlos Roig told Union on February 28, 1980, that the reason Patricia Conners did not get the bid shift was, "Because Salerno don't want her in the casino".

At the Board of Adjustment meeting held on March 25, 1980,

attended by two Hotel representatives and two Union business agents, Louise Horowitz, employee and perhaps others, the only discussion relative to the failure of Hotel to place employee in the job on the casino floor was to the effect that the casino boss did not want her on the floor and nobody dared or could go over his head.

Union and Hotel agreed to waive action on the bid shift grievance pending resolution of the second grievance. The vote split two to two with the Union contending that since the customers were not present, the

charge of rudeness was not proven.

The Union had written to the customers asking for details of the event in issue. The letter to Davis was returned because he did not live at the address he had given. Gasperian responded, but only to refer the Union to the report made at the time of the event at the Hotel.

Later Hotel presented Union with affidavits prepared by Hotel in March and signed by the customers in April, 1980. Union dated the Affidavits upon receipt from Hotel and based thereon, decided not to proceed

to arbitration.

Marge Conley, the Union business agent with twelve (12) years experience investigating grievances, testified that she was used to writing reports, detailed reports, but could not find any notes or any statements in this case where she talked to any waiters, the hostess, or any other person in connection with her investigation save and except the notation of Carlos Roig that Lou Salerno will not have Pat Conners in the Casino area.

REASON FOR GRANTING THE WRIT

This appeal presents for this Court's consideration issues of the utmost importance- - issues which have implications which go far beyond this particular case. If a Labor Union may conduct its proceedings as it did in this instance, then any union or government regulatory agency may do likewise. To affirm the decision that Defendant Union did not handle Plaintiff's grievances in a manner which was arbitrary, discriminatory or in bad faith, under these circumstances, would require drastic departuare from past decisions of this Court. Affirmance

would advise a Union that the less it does to investigate grievances, the stronger will be its position to meet a challenge of failure to meet its duty of fair representation.

Simply stated, the Union did nothing more than make a pretense of investigating a grievance filed by an employee against an employer. The Union knew that Patricia Conners had incurred the wrath of Louis Salerno, Casino Boss of Hotel. That Louis Salerno let it be known that he did not want Patricia Conners on the premises: " I don't want her in my casino". Notwithstanding the known animosity of Louis Salerno toward Patricia Conners, and the fact that for five (5) months she endured

working conditions at the Hotel that were less than ideal, under any standard, let alone Union standards. Yet, the investigation undertaken by the Union on behalf of its member certainly did not protect her rights to a fair and meaningful representation. Thus, the duty of a labor union to represent an aggarieved employee in disputes between employer and employee was rendered a nullity by the District Court decision. A Union decision not to go to arbitration based upon an inadequate investigation of facts and a refusal to make a proper investigation, cannot be characterized as anything other than bad faith.

SOME INVESTIGATION IS REQUIRED BY A UNION TO CONFORM WITH ITS DUTY OF REPRESENTATION

The duty of a labor union to represent an aggrieved employee in disputes between employer and employee is a function of the relationship of the union and its member.

> By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibilty faithfully - - a duty which it owes to the employees whom it represents and on which the

employer with whom it bargains may rely. Bowen v. United States Postal Service 459 U.S. 212.

Since the truth was easily discoverable by talking to Bob Jones, and since the "sworn" statements of the two Stardust witnesess were readily impeached by talking to Louise Horowitz,this case also falls within the scope of Hines v. Anchor Motor Freight,Mc.,424 U.S. 554. Hines holds that where an employee discharge is based upon false charges, where the truth is discoverable with a minimum investigation the failure of the union to make the investigation is an actionable breach of its duty of fair

representation (even after an arbitration hearing).

It is established that the conduct of the Stardust was wrongful on both grievances.

It is also established that the identity and knowledge of the witnesses Salerno, Horowitz and Jones was always readily available to the Union with only modest expenditure of time and money.

The Union chose not to talk to these witnesses.

By refusing to make a reasonable investigation, the Union breached it duty of fair representation.

The Court of Appeals in its Memorandum opinion in Conners v. Culinary Workers Local 226, Case No.

86-1548, dated March 16, 1987, (App. A. infra 1A-3A) found that "the record supports Conners' claim that there is at least a question of fact as to whether she was terminated for wilful misconduct". And further found "that the affidavits upon which the Union relied were not valid".

A HIGH STANDARD OF CARE IS IS REQUIRED IN INVESTIGATION AND PREPARATION OF DISCHARGE CASES

The Court of Appeals cites Johnson v. United States Postal Service, 756 F.2dd 1461 (9th Cir. 1985) as the basis of its decision.

However, even Johnson states"

> Finally, a union's duty includes some minimal investigation and preparation of employee grievances, the thoroughness of which depends on the given case. Tenorio v. N.L.R.B., 680 F.2d 598, 601 (9th Cir. 1982). The union should be held to a higher standard of care in discharge cases involving off-duty conduct because the sanction is severe and the nexus between job performance and the alleged misconduct is more attenuated.

Johnson's trust worthiness was underlined by his admission of guilt to criminal theft. It was found that there existed a sufficient nexus between the off-duty offense and his job performance to sustain his discharge.

Johnson cites Tenorio v. N.L.R.B., 680 F.2d 598 (9th Cir. 1982). In Tenorior the Union investigation was so grossly inadequate that the court held the union showed a reckless disregard for their rights and thereby breached its duty of fair representation. The investigation, or lack thereof, conducted by the union in Tenorio is

very similar to the one in this instant manner.

In Tenorio the duty of fair representation was stated as follows:

> A union breaches its duty of fair representation if it processes a member's grievance in an arbitrary or perfunctory manner. Vaca v. Sipes,386 U.S. at 190-91, 87 S.Ct. at 916-917. To comply with its duty,a union must conduct some minimal investigation of grievances brought to its attention. NLRB v. American Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980); De Arroyo v. Sindicato De Trabajores Packinghouse, AFL-CIO 42F.2d 281, 284-85 (1st Cir.),

cet. denied, 400 U.S. 887, 91 S.Ct 117,27 L.Ed.2d 114 (1970). The thoroughness with which unions must investigate grievances in order to satisfy their duty varies with the circumstances of each case. Although we afford unions a reasonable range of discretion in deciding how best to handle grievances, union conduct that shows an egregious disgread for the rights of union members constitutes a breach of the duty of fair representation. Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979) (per curiam); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1086 (9th Cir.1978).

The special care in handling a union members grievance where it involves discharge is stated:

" Finally, the Union needed to exercise special care in handling petitioners' grievance because they concerned discharges, the most serious sanction an employer can impose. See Griffin v. International Union, 469 F.2d 181, 183 (4th Cir. 1972). We find no indication in the record that the Union took special care with petitioners'greievance. . . However, the duty of fair representation requires that, before assessing the merits of a grievance, a union must have an ample basis upon which to make

such an assessment. The Union in the instant case lacked such a basis.

See also Evangelista v. Inlandboatmen's Union of Pacific,777 F.2d 1390 (9th Cir.1985).

In Robesky v. Qantas Empire Airways Ltd.,573 F.2d 1082 (9th Cir. 1978) the employee's discharge was stated as "the industrial equivalent of capital punishment.

PETITIONER WAS NOT DISCHARGED FOR INTENTIONAL MISCONDUCT, THEREFORE, HER DISCHARGE WAS AS A RESULT OF EITHER, A BREACH OF THE UNIONS DUTY OF FAIR REPRESENTATION, OR CONSPIRACY BETWEEN IT AND HOTEL

In the instant matter, the trial court made an oral finding of fact that PATRICIA CONNERS' "firing was unjustified and in my judgment I don't think the incident occurred". Yet, the trial court applied the legal standard of intentional misconduct in denying her relief and held the investigation by the Union, "while neither perfect nor ideal", was proper.

The Court of Appeals found that "the record supports Conners's claim that there is at least a question of fact as to whether she was terminated for wilful misconduct". (App. A., infra 1A)

Substantial evidence exists in the record of a conspiracy between

the Union and Hotel. Even though unrelated to this case, Ben Schmoutey then Secretary Treasurer of Culinary Worker's Union Local 226 and Louis Joseph Salerno, Casino Manager at the Stardust Hotel have been convicted in the United States District Court for the District of Nevada (Las Vegas) for felony crimes of conspirary and racketeering. (App.B, infra B1 & 2B -5B).

The Plaintiff, in a civil conspiracy case, must prove her case by a prepondrance of the evidence. Circumstantial evidence may be sufficient for this purpose. The substantial evidence is as Lou Salerno testifed: "I tried to fire her -I didn't like her in my pit -

and I would have. "I went to the union, the fellows that ran the union, and I tried to get her midnight at the pool, but I couldn't get that so I did the next best thing. I said, 'Just put her somewhere where I don't see her. I don't want her in my casino".

The substantial evidence is that the Union did nothing to investigate this matter. The substantial evidence is that Hotel investigated the discharge for Union. The substantial evidence is that the Union breached its duty of fair representation either by its misconduct or a conspiracy between it and Hotel.

A problem existed, Lou Salerno

had given a direct standing order that Patricia Conners was not to be in the casino area. Lou Salerno could fire, or have fired, Max Hamilton and/or Carlos Roig. Lou spoke on behalf of three (3) casinos, and when he spoke, Union listened. Perhaps, Union did not react every time Salerno spoke, but in an instance when Salerno was adamant and only one insignificant employee, whom Union had previously been able to bamboozle with impunity, was all that was at stake, the Union reacted. Because, on this record it certainly can be said that the Union acted in a manner reflecting Salerno's desire. Lou Salerno

testified that he "went to the Union the fellows that ran the Union" to ensure that his desire was carried out.

Marge Conley, the Union business agent, testified that she had 12 years of experience in that capacity. As an investigator she was used to writing detailed reports. She testified at trial, even though she had never made any previous mention of having done so, that she went to the Hotel. She did not know what date she went to the Hotel, but guessed that it must have been within ten (10) working days of Patricia Conners' termination because the grievance had to be filed within that time.

In any event, she failed to investigate the basis of discharge. Her testimony was such that she knows she did not talk to Bob Jones; she may have talked to others, but if so, does not remember doing so, and did not take any notes or make any written report.

However, she did make a written notation of the fact that "Lou Salerno will not have Pat Conners in the casino area". Strangely enough, the only other written documentation by the Union are the letters written to the customers asking for details of the event in issue. The letter to Davis was returned because he did not live at the address he had given. Gasperian resonded but only to refer

the Union to the report made at the time of the event. Employee was not at any time given the names and addresses of these customers because, as the Union agent explained, the Hotel insists that names be kept confidential.

Later the Hotel provided Union with affidavits prepared by Hotel in March and signed by the customers in April, 1980. Upon receipt of these affidavits Union decided not to proceed to arbitration.

Those affidavits, however, are a whole story in themselves. Louise Horowitz in 1980 was employed by Hotel as Director of Peronnel. She typed the affidavits using the statements the guests had already

signed on March 9, 1980, as a pattern. She picked up the wording for the affidavits in March because "day of March, 1980" was crossed out.

Thereafter, probably the 11th day of April, 1980, one of the Hotel executives gave the affidavits to Louise Horowitz, told her that he saw the gentlemen sign them and asked her to notarize them. She never saw the gentlemen sign the affidavits, in fact she never saw the guests at all.

Marge Conley testified that she picked up the affidavits from Louise Horowitz. "I signed these signatures. Above Louise's name is my writing, the day that I received them". During cross examination she reaffirmed that she dated and signed

the affiadavits.

We feel that the court of Appeals cited Johnson, supra, to sustain its decision because the Affidavits in the instant case were found to be invalid and that the Union could base its decision not to arbitrate upon its then existing perception of current evidence, i.e., that Johnson had plead guilty to a misdemeanor. Similarly, the Affidavits in the instant case were presumed valid. However, the difference is this: In the Johnson case, he was allowed to withdraw his plea of guilty, enter a plea of not guilty, then the case was dismissed. He was in fact actually guilty. In the instant case the conclusion can

be readily drawn that the Affidavits were invalid and that fact was known to the Union at the time the Union made its decision after the grievance hearing. CONNERS went to Ben Schmoutey of the Union to ask for copies of the items in her file. He refused to give her copies of the Affidavits, but did give her copies of the complaint forms after first whiting out the names and addresses of the customers in front of her. This was obviously done so that CONNERS could not check with customers and discover that the Affidavits were invalid and were not signed before a notary public. This definitely indicates collusion with the Hotel who knew the actual facts

and shows dishonesty and collusion on the part of both the Hotel and the Union. Ben Schmoutey's refusal to give her the notarized Affidavits distinguishes the subsequent change of fact in the Johnson case from the subsequent discovery of the invalidity of the Affidavits in the instant case and we also feel that it shows a "coverup" by the Union and the Hotel which has deprived the Petitioner of both substantive and procedural constitutional due process rights.

The collusion between the Union and Hotel continued through trial of this cause. After the trial Hotel paid Union for its stipulation to dismiss the Third Party Complaint

filed by Union against Hotel.

The Union had complete control of the grievance and, therefore, controlled the outcome of the grievance. The substantial evidence on this record established either misconduct by the Union or a conspiracy between it and the Hotel.

The acts of the Union herein, were wrongful, intentional or untentional. The failure to demand the presence of the complainants at the Board of Adjustment meeting. The deliberate misrepresentation that Bob Jones had been terminated. The Union complicity in preparation of the affidavits. In combination, the aggregate effect of these factors was "the industrial equivalent of capital

punishment". Robesky, supra, at 1091.

As was stated by the Robesky Court "[t]he policies underlying the duty of fair represention would be served by affording appellant a remedy for the grave injury resulting from the egregious conduct of her collective bargaining agent". Id.

The egregious conduct of the Collective bargaining agent in the instant proceeding suggests "to those of a paranoid and conspiratorial turn of mind the presence of a fox in the hen house".

CONCLUSION

For the foregoing reason, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

PETER L. FLANGAS

Attorney for Petitioner

MEMORANDUM

The record supports Conners' claim that there is at least a question of fact as to whether she was terminated for willful misconduct. Her union filed a grievance and a union business agent investigated the allegation. After reviewing two notarized affidavits allegedly sworn to by the complaining guests, and in reliance on the facts as recited in those affidavits, the union could properly elect not to pursue arbitration. The trial court did not err in entering judgment for the union. Substantial evidence supports the conclusion that the union violated no duty, although it

was later determined that the affidavits upon which the union relied were not valid. See Johnson v. United States Postal Service, 756 F.2d 1461, 1464 (9th Cir. 1985).

A labor union, as the sole representative of its members, has a statutory obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v Sipes, 386 U.S. 171, 177 (1967). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad

faith." Id. at 190. A union, however, has wide discretion to act in what it perceives to be its members' best interest. See Johnson, 756 F.2d at 1465.

AFFIRMED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Defendant Culinary Workers Union, Local 226 (hereinafter "the Union) is a labor organization within the meaning of the Title 29 U.S.C. Sections 152 and 185, located in Clark County, Nevada, and at all relevant times was plaintiff's collective bargaining representative.

2. Karat, Inc., dba Stardust Hotel (hereinafter "the Stardust") is a corporation which was engaged in the operation of a hotel and gaming

casino in Las Vegas, Nevada, at all times relevant herein, and is an employer engaged in interstate commerce within the meaning of Title 29 U.S.C. Sections 152(2) and 185.

3. At all times relevant hereto, a collective bargaining agreement was in effect between the Union and the Stardust. Said collective bargaining agreement established the terms and conditions of plaintiff's employment and contained a grievance procedure.

4. Plaintiff was employed by the Stardust as a cocktail server from June 8, 1979, until March 9, 1980.

5. On or about February 19, 1980, plaintiff bid on a job posted

by the Stardust for a different shift and station. Plaintiff was not awarded that job by the Stardust.

6. On February 28, 1980, plaintiff filed a grievance with the Union over her failure to be awarded the shift and station she had bid on.

7. On March 3, 1980, the Union filed a formal grievance with the Stardust concerning plaintiff's job bid grievance. The Union investigated that grievance and set it for a Board of Adjustment grievance hearing pursuant to the collective bargaining agreement between the Union and the Stardust on March 12, 1980.

8. On March 9, 1980, plaintiff was discharrged by the Stardust on

the ground of alleged willful misconduct for alleged rudeness to customers.

9. On March 10, 1980, plaintiff filed a grievance with the Union concerning her termination from employment.

10. On March 12, 1980, the Union filed a formal grievance with the Stardust concerning plaintiff's termination from employment.

11. When plaintiff filed her grievance with the Union regarding her termination by the Stardust the only witnesses to the incident which led to her termination which she identified to the Union were herself and the two customers.

12. On March 12, 1980, the Union wrote letters to the customers requesting their versions of the incident which led to the plaintiff's termination.

13. On March 25, 1980, a Board of Adjustment was held by the Union and the Stardust, at which the plaintiff was present, concerning plaintiff's two pending grievances.

14. At that Board of Adjustment the Stardust refused to rescind its termination of plaintiff but agreed to waive contractual time limits on the processing of plaintiff's job bid grievance until the matter of her termination was resolved through the contractual grievance procedures. The Union voted to rescind the

termination and the termination grievance was therefore deadlocked. The parties agreed that if the termination was upheld, the shift bid grievance would be moot.

15. Between March 25, 1980, and April 14, 1980, the Union received from the Stardust statements signed by the customers involved in the incident leading to plaintiff's termination which were sworn and authenticated on their faces and which fully supported the position of the Stardust regarding plaintiff's termination.

16. Between March 25, 1980, and April 14, 1980, the Union conducted an investigation of the incident for which the Stardust terminated

plaintiff and sought witnesses to that incident. None of plaintiff's co-workers who were contacted by the Union were able to provide any information to the Union regarding that incident. At no time during the investigation did plaintiff provide the Union with the name or names of any person who witnessed or claimed to have witnessed the incident which led to her termination.
Said investigation, while neither perfect nor ideal, was not arbitrary nor discriminatory and was conducted in good faith.

17. After receiving the additional guest statements, conducting its investigation and

evaluating the case, the Union determined in mid-April of 1980 not to proceed to arbitration on the termination grievance. The Union decided not to proceed to arbitration because it believed it could not win an arbitration based upon the evidence then available to it.

18. On or about April 16, 1980, plaintiff was informed by the Union that it wold not arbitrate her grievance.

19. Plaintiff has not sued the Stardust herein and thus cannot make any recovery from it although the evidence presented to the court may be sufficient to support a finding that her termination was not for just cause.

CONCLUSIONS OF LAW

1. Jurisdiction is found under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

2. Defendant Union did not handle plaintiff's grievances in a manner which was arbitrary, discriminatory or in bad faith. In the absence of such a showing plaintiff cannot prevail against the Union for breach of its duty of fair representation. Vaca v. Sipes, 385 U.S. 171 (1967).

3. Defendant Culinary Workers Union, Local 226, shall have judgment against plaintiff.

JUDGMENT

This action came on for trial on November 20 and 21, 1985, before the court the Honorable Lloyd George, presiding. The Court having made and filed its Findings of Fact and Conclusions of Law and good cause appearing therefor

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Patricia Conners take nothing by her complaint herein and that said complaint be dismissed with prejudice.

MEMORANDUM

Patricia Conners appeals from a grant of summary judgment in favor of defendant/appellee Culinary Workers Union Local 226 (Union). Conners contends that the district court erred in finding that she failed to present genuine issues of material fact in support of her claim that the Union breached its duty of fair representation by refusing to arbitrate her grievance.

We reverse.

STATEMENT OF FACTS

From June 9, 1979, to March 9, 1980, Conners worked as a cocktail waitress at the Stardust Hotel in Las Vegas. Her first station was the casino room. After four months, the casino manager transferred her to the graveyard shift in a restaurant area with little cocktail business, where Conners lost all her tip income. Five months after the transfer the hotel posted a notice of a job opening in the casino room. Conners bid for the position, but although she was the only employee to do so, the hotel hired an outside person. Conners complained to the Union,

which filed a grievance with the hotel.

Six days after the Union filed the grievance, two customers came into the restaurant from the casino area and ordered drinks. When Conners served them, they complained that she brought the wrong drinks. They allege that she replied rudely. Conners claims she was polite. The customers called for the hostess and demanded complaint forms, which they completed. The restaurant manager fired Conners on the spot.

Conners filed another grievance with the Union the next day. The Union grieved the hotel and wrote to the two men asking for their

version of the incident. Two weeks later, Conners met with Union and hotel representatives. They agreed to hold her first grievance in abeyance pending resolution of the termination grievance. The vote on Conners' termination was split, with the Union voting against it on the grounds that it had not yet heard from the two customers.

The next month the hotel provided the Union with affidavits from the two customers, repeating the allegations in their complaint forms. The Union then decided not to arbitrate Conners' grievance. Conners filed suit a year later, charging that the Union breached its duty of fair representation by

refusing to arbitrate. Two and a half years later, the Union moved for summary judgment. The district court granted the motion on May 8, 1984.

STANDARD OF REVIEW

The district court's grant of summary judgment is a question of law reviewed de novo. Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983). We must determine whether there is any genuine issue of material fact and whether the district court correctly applied the substantive law. Id.

DISCUSSION

When a union's conduct toward a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith, the union has breached its duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Union claims that on the facts as presented there was no genuine issue of material fact as to whether it had acted arbitrarily or in bad faith. We disagree.

The circumstances of Conners' termination were suspicious. The hotel advanced no reason for her initial transfer from the casino room to the restaurant; Conners has

steadfastly claimed animosity on the part of the casino manager. When she applied to be reinstated in the casino room, the hotel denied her shift bid despite its obligation to accept the bid of the most senior employee. Only six days after the filing of her grievance regarding her shift bid, two men came into the restaurant from the casino room, where drinks are free, and ordered drinks (in itself a rare event). Claiming that she was rude when asked to change the drinks she brought, they called for the hostess and, seemingly familiar with hotel policy, specifically demanded complaint forms. Given Conners'recent transfer and the even

more recent filing of her grievance against the hotel, this chain of events at least suggest the possibility that the incident in the restaurant was staged.

Yet the Union did little to investigate Conners' grievance, and did nothing at all to investigate Conners' version of events. The Union contacted only the two customers. Predictably, they repeated their allegations of rudeness. The Union did not interview the hostess on duty, nor did it even attempt to locate possible witnesses to the event who could substantiate Conners' story. Conners' earlier transfer and the hotel's refusal to her shift bid

ought to have put the Union on notice that an especially thorough investigation of her termination was necessary.

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the evidence in support of the motion must be viewed in the light most favorable to the opposing party. Adickes v. Kress, 398 U.S. 144, 157 (1970). Given the facts surrounding Conners' transfer, shift bid refusal, and eventual termination, the Union has not shown that there is no genuine issue as to its bad faith or arbitrariness in refusing to arbitraten Conners' grievance without more than a very

cursory and one-sided investigation. Viewing the evidence in the light most favorable to Conners, we conclude that the grant of summary judgment was inappropriate.

REVERSED.

LOUIS JOSEPH SALERNO

JUDGMENT AND PROBATION/COMMITMENT ORDER

Finding & Judgment

Defendant has been convicted as charged of the offense(s)of False tax return, in violation of Title 26, Section 7206(2) of the United States Code, and Aiding and Abetting, in violation of Title 18, Section 2 of the United States Code, as charged in Counts I and II of the Indictment.

Appendix 1B

BEN SCHMOUTEY

VERDICT

1. That we find the defendant, BEN SCHMOUTEY, Guilty of the offense charged in COUNT I of the Indictment.

3. That we find the defendant, BEN SCHMOUTEY, Guilty of the offense charged in COUNT III of the Indictment.

4. That we find the defendant, BEN SCHMOUTEY, Guilty of the offense charged in COUNT IV of the Indictment.

5. That we find the defendant, BEN SCHMOUTEY, Guilty of the offense charged in COUNT V of the Indictment.

Appendix 2B

6. That we find the defendant, BEN SCHMOUTEY, Guilty of the offense charged in VI of the Indictment.

BEN SCHMOUTEY

INDICTMENT

COUNT I

(Conspiracy)

COUNT III

(Mail Fraud;and Aiding and Abetting)

COUNT IV

(False Statements in a Document Required to be Kept by E.R.I.S.A.)

COUNT V

(False Statements in a Document Required to be Kept by E.R.I.S.A.; and Aiding and Abetting)

COUNT VI

(Interstate Travel in Aid of Racketeering; and Aiding and Abetting)